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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SANDERSON DANTAS DE OLIVEIRA, Defendant and Appellant.	B294321 (Los Angeles County Super. Ct. No. TA144210)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Judge. Affirmed.

Kelly C. Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Steven D.

Matthews and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Sanderson Dantas De Oliveira was charged with child abuse homicide for allegedly shaking his two-month-old son Dax and causing him brain injuries that led to his death. Following trial, a jury found appellant guilty, and the court sentenced him to 25 years to life in prison and imposed various assessments and a restitution fine.

On appeal, appellant challenges his conviction, asserting the trial court committed multiple evidentiary errors and erroneously failed to instruct the jury on lesser included offenses, and claiming there was insufficient evidence to support the verdict. Appellant also challenges his sentence, contending the court misunderstood the scope of its discretion to grant him probation, and violated his constitutional rights by imposing the assessments and restitution fine without determining his ability to pay. Finding no reversible error, we affirm.

BACKGROUND

The Los Angeles County District Attorney charged appellant with child abuse homicide (Pen. Code, § 273ab, subd. (a)). Appellant pleaded not guilty, and the case proceeded to trial.

A. *The Trial*

1. *The Prosecution Case-in-Chief*

a. *Events Leading up to Dax's Death*

Appellant and Alexandra Quintana married in 2016 and had two sons: 15-month old J., and two-month-old Dax. Quintana was the primary caretaker for the children, while appellant worked as a Lyft driver 10 to 14 hours a day. According to Quintana, who testified at trial, appellant was a "very loving" father, who loved both his sons and tried to play with them whenever he could.

Quintana also testified, however, that appellant would sometimes get physical during arguments with her. He would push her against a wall and try to get her on the floor by pulling on her arm or sweeping her legs, and he once put his thumbs in her mouth and pulled her cheeks. Quintana never called the police because she was afraid of what would happen once they left and because she did not want to press charges.

Dax was born in a C-section delivery on June 23, 2017. According to Quintana, Dax's birth was normal, though she acknowledged she was not fully aware of what was happening, because a curtain blocked her view and she was under the influence of medication. Following his birth, Dax's development was on track. Quintana testified Dax had started trying to lift his head on his own, he could smile, and he could understand what was funny and what was not. Dax's first checkup and his one-month checkup were both "good."

However, Dax would cry a lot. The parents mentioned this at his first checkup, but the doctor said that crying was normal and that every baby was different. Appellant was "very concerned" about Dax's crying. He repeatedly told Quintana that Dax cried too much and that it was not normal. Appellant complained about Dax's crying almost every time Dax cried, which was multiple times a day. He would get frustrated and say that "something was wrong with the baby."

Quintana testified that about three to four weeks before Dax died, his brother J. threw a Hot Wheels toy car, made of plastic and metal, at Dax's forehead. Dax cried but had no bruise as a result of the impact. On another occasion, a few weeks before Dax's death, he fell from a couch while inside his car seat. Quintana had placed him in the car seat on the couch at the home of her grandmother, Charlene Comstock. Dax's arms were through the car seat's straps, but the straps were not locked. As Quintana was speaking with Comstock, J. pulled the car seat down onto the floor, which had a rug on top of a nonslip pad. Dax's head, chest, and arms were still in the car seat after the fall, and the seat's handle was still up, which "kind of blocked him from hitting the floor completely." When Dax hit the floor, he screamed and then cried for less than a minute. Quintana checked his body and rubbed her hands over his head, but found no dents or bumps. She gave Dax a bottle, and he stopped crying. On the evening of August 28, 2017, while at Comstock's home, J. threw a plastic toy hammer, hitting

Dax's head. Dax cried but stopped after Comstock kissed him. Comstock saw no bruises on Dax.

b. *Dax's Death*

The next day, August 29, at around 3:00 p.m., Quintana was feeding Dax. Needing to use the bathroom, Quintana laid Dax in his crib and propped the bottle up so that Dax could feed himself. When she left Dax, he was drinking the milk, and appellant was getting ready for work. While in the bathroom, Quintana took a quick shower. She was in the bathroom for about five minutes. As Quintana was turning off the water, she heard a faint cry. When she got out of the shower and dried herself off, Dax was no longer crying. She went to the kitchen and saw appellant by Dax's crib with the "left side of his arm propped up," shaking Dax up and down. She could see only Dax's right arm, which was limp and "drooped." She heard appellant's watch, which was loose on his arm, "kind of jingle."

At trial, Quintana demonstrated appellant's movement by moving her hands up and down in a vertical motion. She testified it was a fast up-and-down motion, rather than an "out and in" motion. Quintana had never seen appellant make that motion before. The motion "didn't look violent, but it didn't look normal." Quintana immediately approached to see what appellant was doing. Dax was limp and gurgling. He was pale and his lips were blue. Appellant was panicking. When appellant saw Quintana, he initially put Dax down, but then picked him back up. Quintana took

Dax from him, asked him, "What the fuck did you do?" and said, "Get away from me. Get away from us."

Appellant claimed he had accidently spilled water on Dax when he tried to give him a kiss. He said he saw Dax pale and choking, with his eyes rolling in the back of his head, so he "was kissing the baby good-bye."

Quintana called 911, and appellant started performing CPR. The ambulance arrived quickly, and paramedics restarted Dax's heart and transported him to the hospital. Three days later, on September 1, Dax was pronounced dead.

c. *Dr. Murray's Testimony*

On August 30, 2017, Dr. Sandra Murray, an expert in child abuse pediatrics, saw Dax in the pediatric intensive care unit. According to Dr. Murray, Dax clearly had something wrong with his brain. After seeing that Dax's pupils were dilated and not responsive to light, Dr. Murray consulted with an ophthalmologist to get a more detailed examination. The ophthalmologist informed Dr. Murray that she observed recent retinal hemorrhages, no more than several days old. Dr. Murray examined CT scans of Dax's head, which showed subdural hematomas -- bleeding into the subdural space around the brain. The scan showed different densities, which could, but did not necessarily, indicate a mixture of older and newer blood. Dr. Murray determined that Dax had acute blood, meaning hours- to days-old bleeding, around his brain.

Dr. Murray saw no evidence of infection, tumor, or congenital or vascular problem, which "pretty much leaves trauma, as the explanation" for Dax's injuries. She explained that when the head goes through "acceleration/deceleration and rotational injury," the brain "bounce[s] around inside the head." This type of injury stretches and tears the vessels connected to the brain, causing bleeding. This would also pull on the retina and cause retinal hemorrhages. Dr. Murray opined that Dax's brain and eyes were damaged by acceleration/deceleration and rotational injury.

Dr. Murray could not tell from the CT scan whether Dax's brain injury was caused by shaking or impact. If an adult shook a baby up and down, the shaking would have to be done "forcefully and violently" to cause the injuries Dax had. She explained that babies are unable to support their heads, so shaking them very forcefully up and down would cause their heads to "flop[] around. Injury could also occur if the child was very forcefully slammed on a surface, which would cause the brain to accelerate or decelerate within the skull, and this would not necessarily leave external evidence of the slamming. In Dr. Murray's opinion, Dax died from "abusive head trauma," meaning trauma that occurred from an abusive or inflicted act.

Based on her review of Dax's birth records, Dr. Murray concluded there was nothing traumatic about his birth and nothing wrong with his head. She noted the measurement of Dax's head at birth was recorded as 37 centimeters, but at

his first checkup a week later as 35.5 centimeters. She explained that had she seen this measurement discrepancy in a baby she was examining but found no abnormality in the baby's head, she would have concluded one of the measurements was incorrect. In any event, she testified, nothing in the two measurements would explain Dax's death, and her opinion that Dax had suffered abusive head trauma would not change.

Dr. Murray opined that if a 15-month-old threw a Hot Wheels car at a two-month-old's head, she would expect no brain injury. She likewise would expect no such injury from a 15-month-old throwing a plastic hammer at a two-month-old's head. Finally, in response to a hypothetical, Dr. Murray opined that if a two-month-old fell from a couch onto a carpeted surface while secured in his car seat and landed in the car seat "on [his] side," she would expect no injury.

d. *Dr. Szymanski's Testimony*

Dr. Linda Szymanski, a medical examiner certified in pediatric pathology and neuropathology, conduced Dax's autopsy. Dr. Szymanski noted Dax had subdural hemorrhage and cerebral edema, which meant he had severe brain swelling. She found only "very recent" blood in Dax's head. Dr. Szymanski noted that Dax had retinal hemorrhage, and stated it was very extensive and consistent with abusive head trauma. She also observed an area of impact to the back-right side of Dax's head, which caused

internal bleeding. Dr. Szymanski additionally found significant hemorrhages in Dax's spinal nerves and in his cervical spine roots. According to Dr. Szymanski, these injuries were consistent with a severe amount of trauma occurring to the neck from a back-and-forth bending of the neck. These findings were consistent with shaking, but could also occur in a car accident. Dr. Szymanski concluded that Dax "was shook" and "hit on some sort of surface," causing his injuries and subsequent death.

e. *Dr. Boger's Testimony*

Dr. Donald Boger, a radiologist, reviewed Dax's case. Dr. Boger testified that Dax had multiple healing fractures in his ribs. He estimated these fractures were between one month and six weeks old. Dr. Boger identified middle-rib fractures, and opined they were of a kind "[m]ost commonly associated with fingertips that are compressing a rib and squeezing it . . . ." He further opined those fractures occurred on at two separate occasions.

Dr. Boger also identified fractures in Dax's upper ribs, and stated he had never before seen those kinds of fractures in those ribs, which were well protected by other parts of the body. Dr. Boger was surprised to see those fractures and could not explain how they had occurred.

2. *The Defense Case*

a. *Appellant's Testimony*

Appellant was from Brazil and testified with the assistance of an interpreter. He testified he was present for Dax's birth and that doctors used a vacuum on Dax's head during the delivery. Dax cried a lot, but during checkups, doctors said Dax was healthy.

On the afternoon of August 29, 2017, appellant took a nap with Quintana. When he awoke, Quintana was no longer in bed, and he could hear the shower running. Dax was sleeping, and appellant did not hear Dax cry at all that day. Appellant got up because he needed to go to work. He grabbed the water bottle next to his bed and went toward the bathroom to brush his teeth. On the way, he passed Dax's crib. Appellant bent down to give Dax a kiss, but saw that Dax's eyes were open, and the child had white liquid coming out of his nose and the corners of his mouth. Appellant was so nervous when he saw this that he let his water bottle fall and grabbed Dax, who was limp. Appellant held Dax in front of him, moved him up and down once or twice, and said, "Dax, Dax," to try to wake him up. Appellant thought Dax was choking on his milk.

When Quintana came into the room, appellant put Dax in the crib and tried to massage his chest. Quintana took him out of the crib and started screaming, "[W]hat's wrong with him?" Appellant took Dax back from her, told her to call 911, and tried to perform CPR. Appellant did not know how Dax had received his injuries.

As to his relationship with Quintana, appellant denied ever pushing her or pulling her down to the floor. He claimed that on several occasions, Quintana became angry with him and attempted to use physical force against him.

b. *Dr. Gabriel's Testimony*

The defense called Dr. Ronald Gabriel, a retired clinical professor of neurology in pediatrics at UCLA. Dr. Gabriel testified based on Dax's medical records, that during the child's C-section, doctors used a vacuum extractor to get him out. He explained this meant Dax had a very difficult delivery, and that the use of the vacuum extractor resulted in cephalohematoma, hemorrhaging just under the scalp but over the bone. Dr. Gabriel noted that almost 100 percent of children born with the use of a vacuum extractor will have a cephalohematoma, and that up to 50 percent of children will have bleeding inside the brain.

According to Dr. Gabriel, a cephalohematoma tends to inflate an infant's head circumference. Thus, a measurement taken a week or two after the birth, as the cephalohematoma deflates and begins to disappear, will show the baby's true head circumference. Dr. Gabriel opined that this is what happened with Dax: at birth, Dax had a larger head circumference than was measured at his first checkup, a week later.

According to Dr. Gabriel, Dax's CT scan showed hyperdense areas, indicating acute hemorrhages, and hypodense areas, indicating chronic hemorrhages. He said

the chronic hemorrhages were "almost certainly" the result of the vacuum extractor and periodic rebleeding. Dr. Gabriel opined that the significant bleeding Dax had at the time of his birth left him vulnerable to experience rebleeding even by mere "jostling." The expert noted that Dax's head was significantly enlarged at the time of his admission to the hospital, which confirmed he had been suffering from chronic bleeding and rebleeding, as his head could not have inflated so much in the time from his alleged shaking to his admission to the hospital.

Dr. Gabriel saw Dax's persistent crying as additional confirmation of his chronic brain injuries. He testified that it was unusual for medical records to register complaints about excessive crying, and opined that Dax's persistent crying meant that blood was "touching and irritating the coverings of the brain . . . ."

When told that Dax's autopsy revealed no old blood, Dr. Gabriel replied that he was not surprised, as old blood would have "drained out" by the time of the autopsy. As to Dax's retinal hemorrhages, Dr. Gabriel opined it was caused by "high pressure and blood on the brain," rather than shaking.

In response to a hypothetical, Dr. Gabriel testified that a metal and plastic object thrown at a two-month-old's head could cause injuries of the kind Dax suffered. Similarly, he testified that a plastic toy hammer weighing about an ounce could kill a one- or two-month-old. Dr. Gabriel opined that the plastic hammer J. had thrown at Dax caused a rebleed.

According to Dr. Gabriel, shaking could not have caused Dax's injuries. He explained that a 2012 study conducted on lambs showed that shaking could not cause retinal bleeding or significant subdural hematomas. He further testified that forceful shaking would have caused trauma to muscle, soft tissue, ligaments, and bones in Dax's neck, but that the medical examiner's report disclosed no such trauma. But when asked about the effect of an impact to the head, in addition to shaking, Dr. Gabriel said that impact was "an entirely different story," meaning that an impact could cause severe brain injuries even without causing injury to the neck.

As to Dax's rib injuries, Dr. Gabriel suggested they could have been caused by the difficult delivery or by Dax's fall from the couch. He agreed, however, that he could not opine on how the rib fractures occurred because it was outside his area of expertise.

3. *The Prosecution Rebuttal*

a. *Dr. Murray's Rebuttal Testimony*

Recalled in rebuttal to Dr. Gabriel's testimony, Dr. Murray testified that the use of vacuum extractors in C-sections is normally only to stabilize the baby's head, and that using the device to pull the baby out would be unusual because the opening is larger in a C-section than during a vaginal birth. Thus, the use of a vacuum device alone would not necessarily indicate the baby's head was stuck.

In response to questioning, Dr. Murray confirmed that Dax's head had swollen at a rapid rate from the time of his admission to the hospital to the time of the autopsy, and she opined the swelling was the result of significant forceful trauma to the head. Dr. Murray stated that the best estimate for the timing of Dax's injuries was when he became symptomatic.

According to Dr. Murray, a baby's persistent crying does not indicate a brain injury. She explained that babies who have brain injuries do not eat well, do not respond to their environment, do not look at people, and do not move normally. In response to questioning, Dr. Murray stated that Dax had exhibited none of these expected symptoms.

Dr. Murray opined that Dax's retinal hemorrhages could not have been caused by increased pressure in the brain based on the bleeding pattern the ophthalmologist who examined Dax's eyes reported: "multiple retinal hemorrhages in multiple different layers." She testified this pattern was instead consistent with head trauma. Dr. Murray further opined that Dax had not experienced rebleeding because there was no evidence of enlarged spaces in the subdural or the subarachnoid space.[1]

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[1] In his opening brief, appellant claims Dr. Murray testified that Dax was "'very symptomatic' of a re-bleed . . . ." But in fact, Dr. Murray testified the relevant kind of rebleeding does not cause symptoms, and she noted that Dax was "very symptomatic" to emphasize that his circumstances were inconsistent with rebleeding.

Responding to Dr. Gabriel's claims based on the 2012 study of lambs, Dr. Murray testified that a more recent study conducted on piglets, which were a better model for humans, showed that shaking can cause both retinal bleeding and significant subdural hematomas. She stated, however, that this was a "moot point because we clearly have evidence of impact in addition to the shak[ing]."

As to the claim that Dax's rib fractures could have been caused at his delivery, Dr. Murray opined that a rib fracture resulting from a C-section would be extraordinarily rare. She explained that the only ones documented in the literature involved very large babies, around 10 pounds or more, but that Dax was of average size.

b. *Appellant's Recorded Statements*

The prosecution played portions of one of appellant's interviews with detectives. Appellant said that Dax had never fallen or bumped his head, and that he had seen no bruising on the child. He further stated Dax had no medical problems when he was born. When asked if he knew how Dax came to have his brain damage, appellant said that this was a riddle; he loved his wife and did not want to blame her, but hospital personnel said he and Quintana had shaken the baby.

One of the detectives told appellant, "Either you killed your son or your wife did," and asked, "Are you saying that your wife killed your son?" Appellant replied, "That's it, because it's not me." Appellant again said it was hard for

him to say it was Quintana who had hurt Dax, but that she would have to pay because although he loved her, he loved his son more.

The jury also heard portions of a phone call appellant made to Quintana from jail. In the call, appellant told Quintana, inter alia: "Please, baby. Think and don't fuck with me because I love you. I love our sons and I want a realize what happened [*sic*]." He continued: "And your word, baby, can fuck me or not. That's it, baby. Please, I did not this [*sic*]." Appellant later said: "Please, baby. Please, I know it's really hard for us. It's fucked up for me too. I lose my son. I cannot be around and I'm here. I want to help you for we discover (indecipherable) what happened. But, please, don't fuck with me. Talk it good at court. Please baby."

B. *Verdict and Sentence*

After deliberating for less than three and a half hours, the jury found appellant guilty. The trial court denied appellant probation and sentenced him to a term of 25 years to life in prison. The court also imposed various assessments and a restitution fine. Appellant timely appealed.

DISCUSSION

A. *Evidentiary Challenges*

Appellant challenges multiple evidentiary rulings on both state law and constitutional grounds. We review state law challenges to a trial court's evidentiary rulings for abuse

of discretion. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.) "Specifically, we will not disturb the trial court's ruling 'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*Ibid.*) A miscarriage of justice results only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

As for constitutional challenges to the exclusion of defense evidence, the federal constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Ky.* (1986) 476 U.S. 683, 690.) Pursuant to this guarantee, courts may not exclude evidence that is "vital to a defendant's defense." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684 (*Babbitt*).) "Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103 (*Fudge*).) Finally, the admission of prosecution evidence, even if erroneous under state law, will result in a due process violation only if it makes the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*).) We discuss appellant's challenges in turn.

1. *Exclusion of a Photo of Appellant Holding Dax*

a. *Background*

Prior to the parties' opening statements, the prosecutor objected to the use by appellant's counsel of a photo of appellant holding Dax on the day he was born. The prosecutor argued that the photograph was irrelevant. Appellant's counsel countered that the photo was relevant to show appellant was a loving father. The trial court agreed appellant was entitled to present evidence that he was a loving father, but it found the photo irrelevant, noting it was taken the day Dax was born, and stating it "[did]n't really show anything." The court therefore excluded the contested photo. The trial court asked appellant's counsel if she had a more recent photo, but counsel offered none.

b. *Analysis*

Appellant challenges the court's exclusion of his proffered photo as irrelevant, renewing his argument that it was relevant to show he was a loving father. "As a general matter, evidence may be admitted if relevant." (*Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1213 (*Coffey*), citing Evid. Code, § 350.) "'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive.'" (*People v. Harris* (2005) 37

Cal.4th 310, 337 (*Harris*).) "'The trial court has broad discretion to determine the relevance of evidence [citation], and we will not disturb the court's exercise of that discretion unless it acted in an arbitrary, capricious or patently absurd manner.'" (*Coffey*, *supra,* at 1213.)

The trial court did not abuse its discretion in excluding appellant's photo as irrelevant. Appellant was entitled to offer proof that he was a loving father to Dax close to the time of his death, which would have tended to show a lack of motive to harm his child. (See *Harris*, *supra*, 37 Cal.4th at 337; cf. *People v. Thompson* (2016) 1 Cal.5th 1043, 1116 [defendant's evidence of her loving relationship with victim tended to show she lacked motive to kill him, opening the door for prosecution to present evidence she was not upset after his death].) But the court reasonably determined that a photo of appellant holding Dax on the day of his birth, before appellant had experienced any frustration from Dax's persistent crying, had no tendency to prove he was a loving father to him at the time of his death. The trial court suggested it might permit a more recent photo, but appellant proffered none. The court's ruling was neither arbitrary, nor capricious, nor patently absurd.[2] (See *Coffey*, *supra*, 60 Cal.4th at 1213.)

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[2] Appellant conclusorily asserts the exclusion of the photo violated his constitutional right to present a complete defense. His failure to develop the argument forfeits the issue on appeal. (See *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521 (*Sviridov*) [failure to present reasoned argument constitutes
(*Fn. is continued on the next page*)

Moreover, any error in excluding appellant's photo would have been harmless. Quintana testified appellant was a "very loving" father, who loved both his sons and tried to play with them as much as he could. Given this testimony, a photo of appellant holding Dax on the day he was born would have been cumulative at best. Accordingly, the exclusion of this photo could not have affected the jury's verdict. (See *Watson*, *supra*, 46 Cal.2d at 836; *Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 323 [where proffered testimony would have been cumulative, any error in excluding it was harmless].)

2. *Precluding Appellant's Counsel from Eliciting Appellant's Statement That Something Was Wrong with Dax and the Doctors Were to Blame*

a. *Background*

During cross-examination by appellant's counsel, Quintana testified appellant had told her that Dax cried a lot and that it "wasn't normal." In response to a question by counsel, she confirmed that appellant was "very concerned" about Dax's crying. Counsel then asked if Quintana remembered that "at one point," appellant said, "[T]here's

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forfeiture].) Moreover, given the photo's lack of probative value, it was by no means vital to appellant's defense. Thus, its exclusion did not violate appellant's right to present a defense. (See *Babbitt*, *supra*, 45 Cal.3d at 684; *Fudge*, *supra*, 7 Cal.4th at 1103.)

something wrong [with] this baby and I think the doctors are to blame." The prosecutor objected to this question on hearsay grounds, and the trial court sustained the objection. In response to additional questioning, Quintana confirmed that appellant would say that "something was wrong with the baby."

b. *Analysis*

Appellant challenges the trial court's limitation of his counsel's cross-examination, asserting the hearsay statement counsel sought to elicit would have been admissible as non-hearsay evidence of his state of mind. He claims the statement was offered to show that appellant was not necessarily frustrated with Dax, but instead was concerned about his health and frustrated with the doctors.

Initially, the Attorney General contends appellant's challenge is not cognizable because he failed to make his admissibility arguments before the trial court. We disagree. "Normally, a reviewing court may not consider a claim that the trial court erroneously excluded evidence unless '[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means . . . .'" (*People v. Hardy* (2018) 5 Cal.5th 56, 103 (*Hardy*), quoting Evid. Code, § 354, subd. (a).) Our Supreme Court has held that the necessary offer of proof must include any argument that the evidence is admissible non-hearsay. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1178.) However, if the proponent of the evidence seeks

to elicit it by cross-examination within the scope of the direct examination, the proponent need not make an offer of proof to permit appellate review of its exclusion. (*Hardy*, at 103, citing Evid. Code § 354, subd. (c) [offer of proof not required when "'[t]he evidence was sought by questions asked during cross-examination or recross-examination"'].) Because appellant's counsel sought to elicit the relevant statement through cross-examination of Quintana within the scope of her direct examination, counsel was not required to make an offer of proof. (See Evid. Code, § 354, subd. (c); *Hardy*, at 103.) Thus, appellant has not forfeited his challenge to the court's ruling.

Turning to the merits of appellant's claim, we conclude the trial court properly limited his counsel's questioning. Appellant's theory of admissibility on appeal overcomes the hearsay rule: to the extent counsel sought to establish appellant's state of mind, rather than the truth of the matters asserted (that something was wrong with Dax and the doctors were to blame), his statement was not hearsay.[3] (See Evid. Code, § 1200, subd. (a) ["'Hearsay evidence'" is an out-of-court statement "offered to prove the truth of the matter stated"].) But even as non-hearsay testimony demonstrating appellant's state of mind, the only excluded

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[3] Because we conclude appellant's statement was not hearsay, we need not address his alternative arguments that the statement fell within exceptions to the hearsay rule.

portion of his statement was irrelevant.[4] Appellant's speculation that Dax's doctors were responsible for the child's alleged health condition, expressed on a single occasion, in no way negated the inference that he was frustrated with Dax's persistent crying, which was supported by Quintana's testimony that he complained almost every time Dax would cry, multiple times a day.

To the extent appellant wished to show that he was concerned over Dax's health, his counsel was able to do so by eliciting, without objection, Quintana's testimony that appellant had been "very concerned" about Dax's crying, had told her it "wasn't normal" and had said that "something was wrong with the baby."[5] Accordingly, the trial court did not abuse its discretion in precluding counsel's question.

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[4] That the trial court precluded counsel's question on a hearsay objection is immaterial. "[I]f the exclusion of evidence is proper on any theory, the exclusion must be sustained." (*Ceja v. Department of Transportation* (2011) 201 Cal.App.4th 1475, 1483.)

[5] Appellant asserts without meaningful argument that the exclusion of his hearsay statement violated his constitutional right to present a complete defense. Here, too, his failure to present a reasoned argument forfeits the issue on appeal. (See *Sviridov*, *supra*, 14 Cal.App.5th at 521.) In any event, appellant cannot show that this cumulative or irrelevant evidence was vital to his defense. (See *Babbitt*, *supra*, 45 Cal.3d at 684; *Fudge*, *supra*, 7 Cal.4th at 1103.)

3. *Precluding Appellant's Counsel from Eliciting Quintana's Hearsay Statement That on the Day of the Incident, Dax Ate Less Than Usual*

a. *Background*

During Quintana's cross-examination, appellant's counsel asked if she had told Dax's doctors that on the morning of incident, he was only "taking one ounce of milk." Quintana replied: "I don't remember saying exactly one ounce. But he would drink two ounces, kind of start to spit it out. Then I would burp him, then he would take, like, another two ounces or so." Counsel asked if Dax in fact drank less milk than he normally would on the day of the incident, but Quintana could not recall.

When the prosecution called Dr. Murray, the expert child abuse pediatrician, in rebuttal to the testimony of defense expert Dr. Gabriel, Dr. Murray testified that a baby's persistent crying does not indicate a brain injury. She explained that babies who have brain injuries do not eat well, do not respond to their environment, do not look at people, and do not move normally. In response to the prosecutor's question, Dr. Murray stated that Dax had shown none of these symptoms.

On cross-examination, Dr. Murray confirmed she spoke with Quintana the day after Dax was admitted to the hospital. Appellant's counsel asked Dr. Murray if Quintana had told her that Dax "was behaving normally, but [that] he took one ounce of milk as compared to taking five to four ounces of milk previously." The prosecutor objected on

hearsay grounds, and the court sustained the objection. Appellant's counsel then asked if Quintana had told Dr. Murray that Dax's behavior had changed, but the court again sustained a hearsay objection by the prosecutor.

b. *Analysis*

Appellant contends the trial court impermissibly curtailed his cross-examination of Dr. Murray. He maintains he was entitled to test Dr. Murray's credibility by asking about Quintana's alleged hearsay statements concerning Dax's eating and conduct on the day of the incident.

"'"The courts have traditionally given both parties wide latitude in the cross-examination of experts in order to test their credibility. [Citations.] Thus, a broader range of evidence may be properly used on cross-examination to test and diminish the weight to be given the expert opinion than is admissible on direct examination to fortify the opinion. [Citation.]"' [Citation.] 'It is common practice to challenge an expert by inquiring in good faith about relevant information, including hearsay, which he may have overlooked or ignored.'" (*People v. Pearson* (2013) 56 Cal.4th 393, 459-460.)

We conclude the trial court did not reversibly err by limiting counsel's cross-examination of Dr. Murray, as its preclusion of counsel's questions, even if erroneous, resulted

in no prejudice.[6] Appellant contends Quintana's alleged hearsay statement would have undermined Dr. Murray's opinion that Dax had not suffered from a chronic brain injury. We are unpersuaded.

The prosecution called Dr. Murray to rebut Dr. Gabriel's testimony that Dax suffered from a brain injury throughout his short life, based in significant part on the child's persistent crying. Dr. Murray testified that crying does not indicate a brain injury, and that babies who suffer from brain injuries exhibit multiple severe symptoms, only one of which is not eating well. She noted brain-injured babies do not respond to their environment, do not look at people, and do not move normally. There was no evidence Dax had ever exhibited these behavioral symptoms. Nor was there evidence Dax had ever eaten poorly before the day of the incident. Thus, even assuming Dr. Murray would have confirmed that Quintana had made the alleged hearsay statements, evidence that on one particular day, Dax ate less and his behavior somehow "changed" would not have tended to undermine her opinion that Dax had not suffered from a chronic brain injury. Accordingly, the trial court's limitation of counsel's cross-examination could not have affected the

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[6] We again reject the Attorney General's contention that appellant has forfeited this evidentiary challenge. His counsel sought to elicit Quintana's alleged statement through cross-examination questioning of Dr. Murray within the scope of the expert's direct examination. (See Evid. Code, § 354, subd. (c); *Hardy*, *supra*, 5 Cal.5th at 103.)

verdict, and thus no reversible error occurred.[7] (See *Watson*, *supra*, 46 Cal.2d at 836.)

4. *Admission of Quintana's Testimony about Appellant's Prior Acts of Violence against Her*

a. *Background*

Prior to Quintana's testimony, the prosecutor advised the trial court that she intended to introduce appellant's prior acts of domestic violence against Quintana. The prosecutor believed Quintana would attempt to minimize what she had seen appellant do to Dax, and wanted to allow the jury to evaluate Quintana's testimony in the context of her relationship with appellant. The prosecutor made an offer of proof, describing the expected testimony in general terms.

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[7] Appellant contends, without analysis, that the trial court's limitation of his counsel's cross-examination of Dr. Murray violated his constitutional rights to present a complete defense and to confront witnesses against him. Once again, his failure to develop the arguments forfeits the issues on appeal. (See *Sviridov*, *supra*, 14 Cal.App.5th at 521.) Moreover, given that the alleged hearsay statement he wished to inquire about would have had no tendency to undermine Dr. Murray's opinion, its exclusion did not violate his constitutional rights. (See *Babbitt*, *supra*, 45 Cal.3d at 684; *Fudge*, *supra*, 7 Cal.4th at 1103; *People v. Sanchez* (2019) 7 Cal.5th 14, 45 [limitations on cross-examination violate the confrontation clause only if they "'would have produced "a significantly different impression of [the witness's] credibility"'"].)

Appellant's counsel objected to the introduction of this evidence, arguing, inter alia, that it was highly prejudicial and had no probative value. Following additional argument by the parties, the trial court stated that the evidence might prove relevant on the issues of "intent and maybe motive." The court noted it did not know exactly what the testimony would be, and stated that "without more it's kind of difficult to pinpoint every issue that might come up." It concluded: "But I do think pursuant to [Evidence Code sections] 1101 and 1103[,] it might be tangentially relevant. It might be. I mean, I don't know how many instances we're talking about. All I know is what you guys are telling me. And based upon that[,] it might be somewhat relevant. But I don't know . . . how critical it is. . . . but that would be my tentative. To allow it to some limited extent."

Quintana later testified that appellant would sometimes push her against a wall and try to get her on the floor, and that he once put his thumbs in her mouth and pulled her cheeks. She further testified she never called the police, in part because she was afraid of what would happen once they left. Appellant did not object to this testimony.

b. *Analysis*

Appellant challenges the trial court's admission of Quintana's testimony about his prior violent acts. He argues her testimony was both inadmissible propensity evidence under Evidence Code section 1101 and unduly prejudicial under Evidence Code section 352.

Appellant has failed to preserve his challenge for appeal. "A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself." (*People v. Holloway* (2004) 33 Cal.4th 96, 133.) The trial court made clear that its ruling was tentative, concluding that Quintana's testimony "might be tangentially relevant" and noting it did not know what it would be. Yet appellant did not renew his objection when the prosecutor elicited the contested testimony. The issue is therefore forfeited. (See *ibid.*)

Moreover, were we to consider appellant's challenge on the merits, we would reject it. Evidence Code section 1101, subdivision (a), makes evidence of a person's character, including evidence of the person's conduct on specific instances, inadmissible when offered to prove the person's conduct on a specific occasion. (*Ibid.*) However, this provision does not preclude introduction of evidence of a person's prior bad acts for a different purpose (*id.*, § 1101, subd. (b)), including "to support or attack the credibility of a witness" (*id.*, § 1101, subd. (c)). "'Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and therefore is admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court.'" (*People v. Sandoval* (2015) 62

Cal.4th 394, 429-430.) Evidence that appellant had previously assaulted Quintana was relevant to show she could be in fear of him. (See *People v. Case* (2018) 5 Cal.5th 1, 31 [evidence of defendant's violent altercations tended to show witness had reason to fear him].) This evidence was therefore not inadmissible under Evidence Code section 1101.

Nor did Evidence Code section 352 render the evidence inadmissible. Under that provision, trial courts have discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will, among other things, create substantial danger of undue prejudice. (Evid. Code, § 352.) The incidents Quintana described were not particularly inflammatory compared to the charged offense: the degree of violence was not high, and there was no evidence Quintana had suffered any injuries. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [prior bad act's prejudicial effect is "decreased" if it is "no more inflammatory than the testimony concerning the charged offenses"].) Moreover, the prosecution devoted very little time to these incidents; Quintana's testimony about them spanned approximately two pages of the reporter's transcript. (See *People v. Pierce* (2002) 104 Cal.App.4th 893, 901 [prejudicial effect diminished where testimony about prior offense "involved only 17 pages of transcript"].) Accordingly, appellant cannot

show that the trial court abused its discretion in admitting testimony about his prior acts of violence against Quintana.[8]

5. *Admission of Appellant's Jail Call to Quintana*

a. *Background*

During appellant's cross-examination, the prosecutor questioned him about a phone call he had made to Quintana from jail. The prosecutor asked if appellant had told Quintana to "[t]alk good at court." Appellant replied he did not remember. The prosecutor asked if appellant had told Quintana, "Don't fuck with me, talk good at court." Appellant answered he did not remember, as he spoke with Quintana from jail many times. The prosecutor then asked, "Well, any of the times, did you tell her to talk good at court?" Appellant again responded he did not remember. A similar colloquy ensued after the prosecutor showed appellant a transcript of the relevant call.

The prosecutor subsequently sought to introduce a portion of the relevant recorded call, arguing it was permissible impeachment because appellant had denied making the recorded statements. Appellant's counsel

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[8] Appellant argues the admission of Quintana's testimony about his prior violent acts violated his constitutional right to due process, citing authority for the proposition that "the introduction of character evidence to show propensity can violate the Due Process clause." As discussed, Quintana's testimony was admissible for valid, non-propensity purposes.

objected that appellant's testimony was not inconsistent, as he said only that he did not remember if he had made those statements. Counsel further argued the recorded statements were unduly prejudicial. After extended argument by the parties, the trial court concluded that appellant's stated lack of recollection was sufficient to permit the introduction of the recording.

In the portion of the call the prosecution offered, appellant stated, as relevant: "Please, baby. Think and don't fuck with me because I love you. I love our sons and I want a realize [*sic*] what happened." Based on the trial court's admission of this portion, appellant's counsel requested that another portion of the call be admitted, and the court obliged.

In the portion appellant's counsel selected, appellant stated, as relevant: "Please, baby. Please, I know it's really hard for us. It's fucked up for me too. I lose my son. I cannot be around and I'm here. I want to help you for we discover (indecipherable) what happened. But, please, don't fuck with me. Talk it good at court. Please baby." Both portions of the recorded call were played to the jury.

b. *Analysis*

Appellant contends the trial court abused its discretion in admitting portions of his recorded jail call. He asserts this was improper impeachment evidence because the recorded statements were not inconsistent with his

testimony. He also claims these statements were not relevant to any issue at trial, and were unduly prejudicial.

We conclude appellant's recorded statements were admissible regardless of whether they constituted proper impeachment evidence, as they could reasonably be construed to indicate a consciousness of guilt. (See *People v. Brown* (2004) 33 Cal.4th 892, 901 [admission of evidence must generally be upheld if admissible on any theory]. A defendant's effort to suppress evidence, including by intimidating or otherwise dissuading a witness from providing unfavorable testimony, is admissible to prove the defendant's consciousness of guilt. (See Evid. Code, § 413 [trier of fact may consider party's "willful suppression of evidence" in determining what inferences to draw from evidence"]; *People v. Vines* (2011) 51 Cal.4th 830, 867 (*Vines*) ["a threat made by a defendant against a prospective prosecution witness, with the apparent intention of intimidating the witness, is properly admitted because an accused's efforts to suppress evidence against himself indicate a consciousness of guilt"], overruled on another ground by *Hardy*, *supra*, 5 Cal.5th at 104. Appellant's statements to Quintana acknowledging that "your word, Baby, can fuck me or not," his repeated entreaties to her not to "fuck with me," and his plea that she "[t]alk it good at court," could reasonably be interpreted as attempts to dissuade her from giving testimony unfavorable to him. As such, they were relevant to show a consciousness of guilt and thus admissible.

Appellant's recorded statements were not unduly prejudicial for purposes of Evidence Code section 352. Appellant contends "the jury would have been repulsed by [his] statements to Quintana, 'Don't fuck with me,' and 'Talk good in court,' spoken so soon after their baby had died."[9] But it is the fact that appellant spoke those words to his wife so soon after the death of their child that made them probative of his consciousness of guilt. Whatever repulsion appellant's statements may have aroused in the jury would have been marginal compared to their probative value. The undue prejudice Evidence Code section 352 protects against is not "the damage to a defense that naturally flows from relevant, highly probative evidence," but "an emotional bias" that "has very little effect on the issues." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1035.) In short, the trial court did not err in admitting appellant's recorded statements.[10]

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[9] As noted, it was appellant's counsel who requested the trial court admit appellant's statement telling Quintana to "[t]alk it good at court." To the extent the portion of appellant's statements the prosecutor requested was admissible -- and we conclude it was -- appellant may not challenge the admission of the portion he requested. (See *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 38-39 ["But having elicited the evidence themselves, the [appellants] are hardly in a position to object to its admission"].) Regardless, as discussed below, we conclude both portions of appellant's recorded call were admissible.

[10] Appellant argues in conclusory fashion that the trial court's admission of his recorded statements violated his constitutional right to due process. As is by now a common refrain, he has
(*Fn. is continued on the next page*)

B. *Sufficiency of the Evidence*

Appellant argues that the evidence was insufficient to support his conviction under Penal Code section 273ab. "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 (*Ochoa*).) """To warrant the rejection of the statements given by a witness who has been believed by [the trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.""" (*People v. Maciel* (2013) 57 Cal.4th 482, 519 (*Maciel*).) Conversely, the trier of fact generally may reject

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forfeited any contention in this regard by failing to present a reasoned argument. (See *Sviridov*, *supra*, 14 Cal.App.5th at 521.) Furthermore, forfeiture aside, this relevant evidence, which was not unduly prejudicial, did not render appellant's trial fundamentally unfair and thus did not violate his right to due process. (See *Partida*, *supra*, 37 Cal.4th at 439.)

even uncontradicted testimony, whether by lay or expert witnesses, so long as the rejection is not arbitrary. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632 (*Howard*).)

Penal Code section 273ab, subdivision (a), defines the offense of "child abuse homicide."[11] (*People v. Wyatt* (2010) 48 Cal.4th 776, 780.) "The elements of the offense are: '(1) A person, having the care or custody of a child under the age of eight; (2) assaults this child; (3) by means of force that to a reasonable person would be likely to produce great bodily injury; (4) resulting in the child's death.'" (*Ibid.*)

Appellant contends there was no evidence that whatever force he applied on Dax was both likely to cause great bodily injury and resulted in the child's death. We conclude that ample evidence supported those elements.

First, there was strong evidence that appellant assaulted Dax in a manner likely to cause great bodily injury. Quintana testified that appellant had been frustrated with Dax's persistent crying, complaining almost every time Dax would cry, multiple times a day. This evidence supported the inference that appellant had a motive to abuse Dax in order to silence him. (Cf. *People v. Lopez* (2018) 5 Cal.5th 339, 355 [defendant's complaints of

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[11] Penal Code section 273ab, subdivision (a), provides: "Any person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life . . . ."

financial strain from having to care for child suggested motive to harm her].) Dr. Boger, the prosecution's expert radiologist, testified that Dax had multiple healing fractures in his ribs, caused on at least two occasions. As to the middle-rib fractures, he said they were of a kind "[m]ost commonly associated with fingertips that are compressing a rib and squeezing it . . . ." And as to the fractures in Dax's upper ribs, Dr. Boger stated he had never before seen such fractures in those ribs, he was surprised to see them, and he could not explain how they occurred. This evidence suggested that Dax had been squeezed with significant force, and had actually suffered great bodily injury well before the day of the incident.

Evidence regarding the incident itself was damning to appellant. Quintana testified that on the day of the incident, she heard Dax faintly cry as she was about to get out of the shower. She then saw appellant quickly moving Dax up and down in a way that "didn't look normal." Appellant's watch was jingling on his arm, and Dax was limp and gurgling as appellant was shaking him. This evidence showed that on the day of the incident, appellant shook Dax with substantial force, just as Dax began exhibiting symptoms.

Appellant's conduct during and after the incident strongly suggested a consciousness of guilt. During the incident, when appellant saw Quintana approaching, he put Dax down and then offered an implausible explanation of what had occurred: he had spilled water on Dax, and "was kissing the baby good-bye" when he saw his eyes roll in the

back of his head. (Cf. *People v. Price* (1991) 1 Cal.4th 324, 409, 427 [evidence that defendant gave officer implausible explanation for being parked in middle of parking lot for 30 minutes was admissible to show consciousness of guilt].) Following the incident, speaking to Quintana from jail, appellant recognized that her word could "fuck me or not," and he implored her, "[d]on't fuck with me," and, "[t]alk it good at court." As discussed above, these statements could be seen as an improper effort to influence Quintana's testimony, evincing appellant's consciousness of guilt.[12] (See, e.g., *Vines*, *supra*, 51 Cal.4th at 867.)

Next, there was sufficient evidence that appellant's abusive shaking of Dax caused the child's injuries and subsequent death. Two prosecution experts -- an expert in child abuse pediatrics (Dr. Murray) and a medical examiner certified in pediatric pathology and neuropathology (Dr. Szymanski) -- opined that Dax's injuries were caused by both shaking and impact to the head. Dr. Murray testified the best estimate for the timing of Dax's injuries was when he became symptomatic, i.e., the day of the incident. A reasonable jury crediting these experts' testimony would conclude that Dax died from shaking and an impact to the head caused on the day of the incident. Taken together, the

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[12] Appellant argues that the jury "could have" interpreted appellant's statements as urging Quintana not to falsely blame him. The question, however, is not whether the jury "could have" found appellant not guilty, but whether the evidence compelled it to do so. (See *Ochoa*, *supra*, 6 Cal.4th at 1206.)

evidence at trial was more than sufficient to show both that appellant had assaulted Dax with force sufficient to cause great bodily injury, and that this abuse caused Dax's death.

Appellant offers several arguments in an attempt to avoid this conclusion. First, he points to Dr. Murray's testimony that shaking a baby up and down would have to be done "forcefully and violently" to cause injuries of the kind Dax suffered, and notes that Quintana testified his movement of the baby "didn't look violent." But while Quintana subjectively characterized appellant's motions as not appearing violent, she explained they also "didn't look normal." And according to Quintana, appellant's fast up-and-down motions with Dax's limp body caused appellant's watch to jingle on his arm. Moreover, it was clear that Quintana witnessed only the tail end of the incident: she could hear Dax faintly crying as she was getting out of the shower, but he was no longer crying when she witnessed appellant shaking him. The jury could reasonably have concluded that appellant had been shaking Dax with greater force while he was still crying, before he became limp. The evidence that Dax had suffered broken ribs on more than one occasion, at least some of which resulting from squeezing, further suggested that appellant used great force in shaking Dax.

Second, along the same lines, appellant notes that Dr. Szymanski opined that Dax's cervical injuries resulted from a back-and-forth bending of his neck, but that Quintana saw appellant move the baby only up and down.

However, Dr. Murray testified that forcefully shaking babies up and down would cause their heads to "flop[] around" because babies cannot support their heads.

Third, appellant points to the testimony of his expert, Dr. Gabriel, that a fatal shaking would have caused trauma to muscle, soft tissue, ligaments, and bones in Dax's neck, but that the medical examiner's report disclosed no such trauma. Yet when asked about the effect of an impact to the head, in addition to shaking, Dr. Gabriel conceded that impact was "an entirely different story," meaning that it could produce death without causing trauma to those parts of the neck. In any case, the jury was not obligated to accept Dr. Gabriel's opinion. (See *Howard*, *supra*, 72 Cal.App.4th at 632.)

Finally, appellant maintains there was ample evidence for his alternative theory: that Dax suffered from chronic brain injuries caused at birth, and experienced occasional rebleeding caused in part by repeated unintentional impacts, leading to his death. But much of appellant's evidence was contradicted; for instance, Dr. Murray opined that a chronic brain injury would have manifested in symptoms Dax did not have, and Dr. Szymanski testified she saw only "very recent" blood in Dax's brain. (See *Maciel*, *supra*, 57 Cal.4th at 519.) Moreover, appellant's theory rested primarily on the testimony of Dr. Gabriel which, again, the jury was entitled to reject. (*Howard*, *supra*, 72 Cal.App.4th at 632.) In sum, the evidence was sufficient to support appellant's conviction.

C. *Failure to Instruct on Lesser Included Offenses*

1. *Background*

During a discussion of jury instructions, the trial court asked appellant's counsel if there were any lesser included offenses. Counsel answered that there were, but that she was "not requesting them," to which the court responded: "Okay. I see. There are three lessers in the book, but I don't know if they apply. No lessers. Okay." Thus, the court did not instruct the jury on any lesser included offenses.

2. *Analysis*

On appeal, appellant claims the trial court erred in failing to instruct the jury sua sponte on the lesser included offenses of simple assault (Pen. Code, §§ 240 & 241, subd. (a)) and assault by means of force likely to produce great bodily injury (*id.*, § 245, subd. (a)(4)). A trial court has an obligation, even without a request, to instruct the jury on lesser-included offenses if there is substantial evidence to support a conclusion that the defendant committed the lesser offense, but not the greater, charged offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) "The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being

given."[13] (*Id.* at 154.) "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*Id.* at 158.) Instruction on a lesser included offense is necessary when the evidence "'is susceptible of an interpretation, no matter how remote, which if accepted would render the defendant guilty of the lesser included rather than the specifically charged offense.'" (*People v. Morales* (1975) 49 Cal.App.3d 134, 139-140.) In a noncapital case, the erroneous failure to instruct sua sponte on a lesser included offense is subject to state standards of reversibility, and will lead to reversal only if there is a reasonable probability that the error affected the outcome. (*Breverman*, at 165.)

Simple assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) Assault does not require a specific intent to injure the victim, but only that the defendant "actually know[] those facts sufficient to establish that his act by its nature will probably and directly result in

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[13] A defendant may nevertheless waive a challenge to the trial court's failure to instruct on a lesser included offense under the doctrine of invited error. (See *People v. Souza* (2012) 54 Cal.4th 90, 114 [claim may be waived if counsel intentionally causes trial court to err and "expresses a deliberate tactical purpose" in doing so].) We need not decide whether this doctrine applies here, as the Attorney General does not invoke it, and because, as discussed below, we conclude the failure to instruct on any lesser included offense was not prejudicial.

physical force being applied to another." (*People v. Wyatt* (2012) 55 Cal.4th 694, 702.) As relevant here, this offense differs from child abuse homicide under Penal Code section 273ab in that it (1) does not require use of force likely to produce great bodily injury, and (2) does not require that the defendant's act result in the victim's death. The offense of assault by means of force likely to produce great bodily injury also does not require that the defendant cause the victim's death.[14] (Pen. Code, § 245, subd. (a)(4)).

Appellant argues the jury could have found appellant guilty of a lesser included offense, but not of the charged offense, by concluding either: (1) that appellant assaulted Dax by shaking him, but that this abuse did not cause the child's injuries and subsequent death; or (2) that appellant assaulted Dax by shaking him with force which was not likely to cause great bodily injury in a healthy child, but which, given the infant's latent vulnerabilities, caused his death. We conclude there was substantial evidence to support at least the second theory, and thus an instruction on simple assault as a lesser included offense was warranted.

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[14] Penal Code section 245, subdivision (a)(4), provides: "Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment."

Quintana testified that after she heard Dax cry, she saw appellant shaking the child in a way that "didn't look violent" but also "didn't look normal." A reasonable jury could therefore find that appellant assaulted Dax, but might not have shaken him with enough force to cause great bodily injury in a healthy child. Dr. Gabriel opined that Dax had significant bleeding at the time of his birth, leaving him vulnerable to experience rebleeding by a mere "jostling." His opinion was not without evidentiary support. First, both appellant and Dr. Gabriel testified that during Dax's birth, doctors used a vacuum extractor on the child. Dr. Gabriel opined that this indicated a difficult delivery, and he testified that vacuum extractors cause cephalohematomas (hemorrhage under the scalp) in almost all cases, and bleeding inside the brain in as many as half of all cases. Second, based on a comparison of Dax's head circumference at birth and one week later, Dr. Gabriel opined that Dax had cephalohematoma at birth, which temporarily inflated his head circumference until it began to recede. Third, Dax's medical records reflected his parents' concerns that he was crying too much, something Dr. Gabriel testified was unusual. To him, Dax's persistent crying meant that blood was "touching and irritating the coverings of the brain." Finally, Dax's head was greatly enlarged at the time of his admission to the hospital. According to Dr. Gabriel, this confirmed Dax had been suffering from chronic bleeding and rebleeding, because his head could not have swelled so much from the time of the incident to the time of his admission.

Had the jury credited this testimony, it could have found it at least reasonably possible that Dax's ultimate brain injury did not require force likely to cause great bodily injury.

Conceivably, the jury could have found that appellant assaulted Dax by shaking him with force which was not itself likely to cause great bodily injury, but which, given the child's undetected chronic injuries, caused his death. Such a finding would have rendered appellant guilty of the lesser included offense of assault, but not of the charged offense of child abuse homicide. Accordingly, an instruction on the lesser included offense of simple assault was warranted. (See *Breverman*, *supra*, 19 Cal.4th at 154.)

We conclude, however, that the court's failure to give the instruction was not prejudicial. That the evidence was substantial enough to warrant the instruction does not mean that it was strong enough for the error to affect the outcome. (*Breverman*, *supra*, 19 Cal.4th at 177.) Unlike the merits inquiry, the consideration of prejudice "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration." (*Ibid.*) "In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Ibid.*)

While Dr. Gabriel's testimony was enough to warrant a lesser offense instruction, it was significantly weaker than the People's evidence. For instance, while Dr. Gabriel testified there was chronic bleeding in Dax's brain, Dr. Szymanski, who conducted Dax's autopsy, saw only "very recent" blood in the brain. Similarly, while Dr. Gabriel testified that Dax's retinal hemorrhage was caused by "high pressure and blood on the brain," rather than shaking, Dr. Murray explained that the bleeding pattern reported by an ophthalmologist who examined Dax's eyes -- "multiple retinal hemorrhages in multiple different layers" -- could not have been caused by increased pressure in the brain, and was, instead, consistent with head trauma. And while Dr. Gabriel testified that based on a 2012 study conducted on lambs, shaking cannot cause retinal bleeding or significant subdural hematomas, Dr. Murray testified that a more recent study conducted on piglets -- a better model for humans -- showed that shaking can indeed cause retinal bleeding and significant subdural hematomas.

Even if some or all of the jurors credited Dr. Gabriel's opinion that Dax suffered from chronic bleeding and rebleeding, and that this condition contributed to his death, they would still have had to determine what amount of force appellant used in shaking Dax on the day of the incident. Evidence of Dax's fractured ribs was powerful evidence, indicating the child had already suffered abuse involving extreme force. Dr. Boger testified that these were healing fractures, that some of the fractures were of a kind "most

commonly associated with fingertips that are compressing a rib and squeezing it," and that the latter fractures were caused on at least two separate occasions. Appellant's defense offered no reasonable innocent explanation for Dax's rib injuries. Dr. Gabriel, who agreed that rib fractures were outside his expertise, suggested Dax's delivery or the couch fall could have caused them. But a fall would not have explained the squeeze fractures identified by Dr. Boger. Moreover, the delivery was before the timeframe Dr. Boger provided for the fractures and, in any case, could not explain two separate instances in which those fractures occurred.

In light of this evidence, a jury concluding that appellant assaulted Dax by shaking him in an attempt to silence him would not have been reasonably likely to entertain doubt as to whether appellant used force likely to cause great bodily injury.[15] Finally, we observe that the jury returned the guilty verdict after less than three and a half hours of deliberation, and sent no questions to the court,

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[15] Appellant's other theory of liability for a lesser offense -- that he assaulted Dax by shaking him but did not cause his death -- would have been even less likely to sway any of the jurors. This theory would have required the jury to envision one of two scenarios: (1) appellant assaulted Dax in order to silence him, and by mere happenstance, Dax's chronic injuries manifested at just that time, causing his death shortly thereafter; or (2) Dax became limp due to his chronic injuries, and appellant then shook him in an attempt to wake him, but this shaking still constituted an assault. Neither scenario would have had any reasonable likelihood of acceptance among the jurors.

suggesting its members were in accord in resolving any conflicting testimony and had little difficulty concluding the credible evidence conclusively demonstrated appellant's guilt of the charged offense. (Cf. *People v. Vasquez* (2018) 30 Cal.App.5th 786, 799-800 [failure to instruct on lesser included offense was prejudicial where jury deliberated for two days, asked multiple questions, heard supplemental closing arguments, and acquitted the defendant of two counts; *People v. Woods* (1991) 226 Cal.App.3d 1037, 1052 [failure to give instruction was prejudicial where three days of deliberations and request for read-back indicated close case].) Accordingly, we conclude the trial court's failure to instruct the jury on any lesser included offense was not prejudicial and thus did not constitute reversible error.

D. *Cumulative Error*

Appellant contends a combination of errors rendered his trial fundamentally unfair, requiring reversal. "'[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) We have found error in the trial court's failure to instruct the jury on a lesser included offense. We have also assumed error in the exclusion of Quintana's alleged hearsay statement to Dr. Murray that Dax ate less than usual on the day of the incident, but determined such evidence would not have tended to undermine Dr. Murray's opinion. The addition of these

separately harmless rulings does not change the equation. Appellant suffered no cumulative prejudice. He "was entitled to a fair trial but not a perfect one." (*Ibid.*)

E. *The Trial Court's Understanding of the Scope of Its Discretion to Grant Probation*

1. *Background*

Under Penal Code section 1203, the trial court may grant probation to an eligible defendant if it determines that there are "circumstances in mitigation of the punishment prescribed by law or that the ends of justice would be served by granting probation." (Pen. Code, § 1203, subd. (b)(3).) However, subdivision (e) of that provision lists circumstances that preclude a defendant's eligibility for probation, except in "unusual cases in which the interests of justice would best be served if the person is granted probation." (*Id.*, § 1203, subd. (e).) Among the circumstances triggering this presumptive ineligibility is the defendant's "willful[]" infliction of great bodily injury in the commission of the crime. (*Id.*, § 1203, subd. (e)(3).) In *People v. Lewis* (2004) 120 Cal.App.4th 837, 854, the Court of Appeal construed the willfulness requirement to mean that only a defendant who *intended* to inflict great bodily injury would be presumptively ineligible for probation under this provision.

In his presentence report, the probation officer stated: "As charged, [appellant] is eligible for a grant of probation. However, [appellant] is viewed as unsuitable for community

based supervision due to [the] severity of the crime committed." At sentencing, appellant's counsel told the trial court: "[Appellant] will like for me to ask the court for the following, and I've told him that it will not happen. He would like to ask the court for a suspended sentence. Submitted, your honor." The court replied: "Mr. De Oliveira, that's not going to happen. Legally that's not going to happen, and I might indicate . . . we tried the case in this court for a few weeks and you were a perfect gentleman, cooperative and respectful to the court at all times. I do respect you for that . . . . [¶] However, my hands are tied, and the sentence I am [im]posing, for the most part, is the one mandated by law. So to some extent, my hands are handcuffed like yours. [¶] Nevertheless, I wish you no ill will, but again, the jury made a finding. So I have to, basically, sentence you pursuant to the mandate that's mandated by the law . . . ." The court then recited the jury's findings, tracking the elements of Penal Code section 273ab, and stated: "So based upon that, it's the court's understanding that particular [offense] carries a sentence of 25 years to life, which is what the court is going to impose.

2. *Analysis*

Appellant argues the trial court misunderstood the scope of its discretion to grant probation. Pointing to the court's comments at his sentencing, appellant contends the court erroneously believed he was presumptively ineligible for probation solely because of his offense of conviction. We

agree that the elements of appellant's offense did not render him presumptively ineligible for probation, as they did not require an intent to cause great bodily injury. (See Pen. Code, § 273ab, subd. (a).) We are unpersuaded, however, that the trial court assumed appellant was presumptively ineligible.

"In the absence of evidence to the contrary, we presume that the court 'knows and applies the correct statutory and case law.'" (*People v. Thomas* (2011) 52 Cal.4th 336, 361.) "Isolated or ambiguous remarks by the trial court do not overcome that presumption." (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 835 (*Du*); accord, *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 740 (*Keep Our Mountains Quiet*) [trial court's ambiguous statement did not defeat presumption that it understood its discretion].) The party challenging the judgment "must clearly and affirmatively demonstrate" that the court erred. (*Id.* at 740.)

Applying these principles, we presume the trial court understood the scope of its discretion to grant appellant probation. This presumption is reinforced by the probation officer's report, which stated in no uncertain terms that appellant was eligible for probation. (See *People v. Black* (2007) 41 Cal.4th 799, 818, fn. 7 ["The trial court is presumed to have read and considered the probation report"].)

Contrary to appellant's contentions, the trial court's statements at his sentencing do not demonstrate a

misapprehension of the scope of its discretion. The court couched its comments in qualifying language, stating that its sentence was mandated by law "for the most part," and that its hands were handcuffed "to some extent." These comments were consistent with a recognition that appellant was eligible for probation, but that probation was unwarranted, absent a finding of mitigating circumstances or that probation would serve the ends of justice. (See Pen. Code, § 1203, subd. (b)(3).) The court made neither finding. To the extent the court's comments left any doubt, that ambiguity alone could not overcome the presumption that the court understood the scope of its discretion. (See *Du*, *supra*, 5 Cal.App.4th at 835; *Keep Our Mountains Quiet*, *supra*, 236 Cal.App.4th at 740.) Accordingly, appellant has failed to establish that the court misunderstood the scope of its discretion to grant probation.

F. *Constitutional Challenge to Assessments and Restitution Fine*

Appellant challenges the trial court's imposition of the assessments and restitution fine. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, he argues the court violated his right to due process by imposing them without determining his ability to pay.

Before the trial court, appellant neither objected to the imposition of these financial obligations nor requested a hearing on his inability to pay. We agree with our colleagues in Division Eight that a failure to object in the trial court

forfeits this issue on appeal. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155; accord, *People v. Keene* (2019) 43 Cal.App.5th 861.) Accordingly, we do not consider appellant's contentions.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.